e Court, U. S.
FILED
OCT 2 1980
MICHAEL RODAK, JR., CLERK

No. 80-20

In the Supreme Court of the United States

OCTOBER TERM, 1979

ROBERT N. SQUIRES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court properly instructed the jury on the issue of intent.

2. Whether the district court erred in admitting into evidence petitioner's contemporaneous written statement describing his version of the incident upon which the criminal charge was based.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	1
Argument	2
Conclusion	7

TABLE OF AUTHORITIES

Cases:

Albertson v. *SACB*, 382 U.S. 70	6
California v. *Byers*, 402 U.S. 424	6
Cupp v. *Naughten*, 414 U.S. 141	3
Garner v. *United States*, 424 U.S. 648	6
Garrity v. *New Jersey*, 385 U.S. 493	5
Henderson v. *Kibbe*, 431 U.S. 145	2
Sandstrom v. *Montana*, 442 U.S. 570	4
Screws v. *United States*, 325 U.S. 91	2, 4
United States v. *Abravaya*, 616 F.2d 250	2
United States v. *Davis*, 608 F.2d 698	5
United States v. *Haynes*, 390 U.S. 85	6
United States v. *McClean*, 528 F.2d 1250	4
United States v. *O'Dell*, 462 F.2d 224	4
United States v. *Ogle*, 613 F.2d 233	5
United States v. *Park*, 421 U.S. 658	3
United States v. *Ragsdale*, 438 F.2d 21, cert. denied, 403 U.S. 919	4
United States v. *Shoup*, 608 F.2d 950	2
United States v. *Spiegel*, 604 F.2d 961	5
United States v. *Stokes*, 506 F.2d 771	4
United States v. *Thomann*, 609 F.2d 560	2

Constitution and statutes:

	Page
United States Constitution, Fifth Amendment ..	6
18 U.S.C. 242	1, 2, 3
18 U.S.C 4205(f)	1

OPINION BELOW

The judgment order of the court of appeals (Pet. App. 2-3) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 29, 1980. A petition for rehearing was denied on June 10, 1980 (Pet. App. 4). The petition for a writ of certiorari was filed on July 7, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Central District of Illinois, petitioner, a former police officer in Springfield, Illinois, was convicted of willfully depriving Richard G. Miller of his constitutional rights under color of law, in violation of 18 U.S.C. 242.[1] He was sentenced to one year's imprisonment, subject to the early release provision of 18 U.S.C. 4205(f) (Pet. App. 1). The court of appeals affirmed (Pet. App. 2-3).

The government's evidence at trial[2] showed that in the early morning hours of November 23, 1978, petitioner, who was then on duty, was summoned to the home of

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[1] 18 U.S.C. 242 provides, in pertinent part:

> Whoever, under color of any law, * * * willfully subjects any inhabitant of any State * * * to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, * * * shall be fined not more than $1,000 or imprisoned not more than one year, or both; and if death results shall be subject to imprisonment for any term of years or for life.

[2] A transcript of the trial is being lodged with the Clerk of the Court. Essentially similar descriptions of the events were given by the victim's daughter, Cindy (Tr. 20-36), the victim's wife, Louise (Tr. 65-80), the victim (Tr. 105-118), a friend of the daughter (Tr. 123-129), Officer Hypke (Tr. 141-159) and Officer Fahey (Tr. 185-195).

Richard Miller to resolve a family disturbance over some car keys that belonged to Miller's daughter, Cindy. Richard Miller had been drinking most of the evening, and was drunk and verbally abusive. When petitioner arrived, two other officers were already there and the situation was reasonably under control. Petitioner nonetheless interposed himself between Miller and another officer, pushed Miller into his kitchen and struck him several times, causing him to bleed profusely about the head. The victim was later taken to the hospital; approximately twenty stitches were required to close his wounds.

ARGUMENT

1. Relying on the plurality opinion in *Screws* v. *United States*, 325 U.S. 91, 101–107 (1945), petitioner contends (Pet. 9–15) that the district court failed to instruct the jury that, in order to find petitioner guilty of violating 18 U.S.C. 242, it had to find that petitioner struck his victim with the specific intent of depriving him of a constitutional right. After carefully examining the instructions, however, the court of appeals correctly concluded (Pet. App. 3) that they were consistent with the standards articulated in *Screws*.

At the outset, we note that petitioner did not raise this objection at trial, nor did he offer any alternative instruction. As this Court observed in *Henderson* v. *Kibbe*, 431 U.S. 145, 154 (1977), it is only in rare cases that an improper or incomplete instruction will justify reversal when no objection was made at trial. In those circumstances, the appellate courts will reverse only if plain error was committed. See, *e.g.*, *United States* v. *Abravaya*, 616 F.2d 250, 251 (5th Cir. 1980); *United States* v. *Thomann*, 609 F.2d 560, 565 (1st Cir. 1979); *United States* v. *Shoup*, 608 F.2d 950, 963 (3d Cir. 1979). Petitioner has failed to satisfy the plain error standard here.

On the contrary, when viewed as a whole (*United States* v. *Park*, 421 U.S. 658, 674-675 (1975); *Cupp* v. *Naughten*, 414 U.S. 141, 146-147 (1973)), the court's instructions were complete and correct in all respects.[3] In accordance with settled principles, the court instructed the jury that to convict under 18 U.S.C. 242, it had to find that

[3]The court instructed the jury as follows.

Instruction No. 16 (Tr. 444-445):

The third element to be proved is that the conduct of the Defendant must have deprived the victim of a right secured or protected by the constitution or laws of the United States. The victim in this case, in common with the Defendant and all other persons, including each and every one of you, living under the protection of our Constitution, has the legal right at all times not to be deprived of any liberty secured or protected by the Constitution without due process of law.

One of the "liberties" secured to the victim involved in this case by the Constitution is the liberty to be free from unlawful attacks upon his person. It has always been the policy of the law to protect the physical integrity of every person from unauthorized violence.

"Liberty" thus includes the principle that no person may ever be abused physically and without justification by a person acting under the color of the laws of any state. Accordingly, a person in the custody of arresting state officials, such as police officers, has a constitutional right to be reasonably secure in his person and free from unwarranted physical mistreatment by such officers.

Instruction No. 17 (Tr. 445-446):

With regard to the fourth element—willfullness—an act is done willfully if it is done voluntarily and intentionally, and with the specific intent to do something the law forbids—that is, with bad purpose to disobey or disregard the law; in the case of the statute involved here, with specific intent to deprive the victim of liberty without due process of law.

With regard to specific intent, intent is a state of mind that can be proven by circumstantial evidence. Indeed, it can rarely be established by any other means. In determining whether this element of specific intent was present you may consider all the attendant circumstances of the case.

You may infer that a person ordinarily intends all the natural and probable consequences of an act knowingly done. In other words, you may in this case infer and find that the Defendant

petitioner deprived his victim of a right secured by the Constitution of the United States and that petitioner acted with the specific intent to effect that deprivation. See *Screws* v. *United States*, *supra*, 325 U.S. at 103-105 (plurality opinion); *United States* v. *Stokes*, 506 F.2d 771, 774 (5th Cir. 1975); *United States* v. *O'Dell*, 462 F.2d 224, 230 (6th Cir. 1972). The Court further instructed that the constitutional right of due process of law includes the right not to be assaulted unreasonably and without justification by law enforcement officials while in their custody or control. See *United States* v. *Stokes*, *supra*, 506 F.2d at 775-776. Finally, the court instructed the jury that petitioner need not have been thinking in constitutional terms, so long as he knowingly and intentionally performed the act that deprived the victim of his constitutional rights. See *United States* v. *McClean*, 528 F.2d 1250, 1255 (2d Cir. 1976); *United States* v. *Ragsdale*, 438 F.2d 21, 26 (5th Cir.), cert. denied, 403 U.S. 919 (1971).[4]

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intended all the consequences that a person, standing in like circumstances and possessing like knowledge, should have expected to result from his or her act or acts knowingly done.

It is not necessary to show or prove that the Defendant was thinking of Constitutional terms, at the time of the incident, for a reckless disregard for a person's Constitutional rights is clear evidence of specific intent to deprive that person of those rights. You may find that the Defendant acted with requisite specific intent even if you find that he had no real familiarity with the Constitution or with the particular Constitutional right involved provided that you find that the—that he willfully and consciously did the act which deprived the victim of his constitutional rights. Nor does it matter that the Defendant may have also been motivated by hatred or revenge or some other emotion, provided the intent which I have described to you is present.

If you find that the Defendant knew what he was doing and he intended to do what he was doing, and if you find that what he did constituted a deprivation of a Constitutional right, then you may conclude that the Defendant acted with the specific intent to deprive the victim of that constitutional right.

[4]Petitioner also contends (Pet. 13-15) that the court's instruction on specific intent was contrary to the principles of *Sandstrom* v. *Montana*, 442 U.S. 510 (1979). This contention is frivolous. Unlike the in-

2. Relying on *Garrity* v. *New Jersey*, 385 U.S. 493 (1967), petitioner claims (Pet. 15–16) that a written statement prepared by him on the day of the incident was coerced, and that the district court erred in admitting the statement into evidence. This claim is insubstantial.

In *Garrity*, the Court held that a police officer's statement made in the course of an internal police department investigation was involuntary and inadmissible in evidence against the officer at a subsequent criminal trial where the officer was advised, prior to questioning, that if he refused to answer he could lose his job. There is no evidence in this case that petitioner's statement was involuntary under *Garrity*. In the first place, petitioner concedes (Pet. 15) that he was not threatened that his employment would be terminated; thus, unlike the officer in *Garrity*, he was not subjected to the choice of either forfeiting his job or incriminating himself. Second, so far as the record shows, the statement was not made as part of any official investigation of the incident. The statement indicates that it was prepared on the same day as the incident it describes, November 23, 1978.[5] Richard Miller did not file a complaint against petitioner until some time later (Tr. 292,

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struction in *Sandstrom*, which was couched in the language of a mandatory presumption, the instruction in this case was consistently phrased in terms that made it clear that the jury was permitted, but not required, to draw certain inferences or conclusions from the evidence. Compare *Sandstrom* v. *Montana*, *supra*, 442 U.S. at 514–515; see *id.* at 527 (Rehnquist, J., concurring). See also, *e.g.*, *United States* v. *Ogle*, 613 F.2d 233, 242–243 (10th Cir. 1979); *United States* v. *Davis*, 608 F.2d 698, 699 (6th Cir. 1979); *United States* v. *Spiegel*, 604 F.2d 961, 968–969 (5th Cir. 1979).

[5] We are lodging a copy of the statement (Gov't Ex. 16) with the Clerk of the Court.

298-299), and the chief of police did not order the complaint investigated until November 29, 1978 (Tr. 280).[6]

It may well be that the exhibit represents the kind of statement that officers are expected to file with respect to all such incidents in the normal course of business. No evidence was introduced to that effect, however. And this Court has never held, in any event, that every record required to be kept will be treated as "compelled" for Fifth Amendment purposes. If the sort of information required to be disclosed were *inherently* incriminating, that would be a different story. See, *e.g.*, *United States* v. *Haynes*, 390 U.S. 85 (1968) (firearm registration); *Albertson* v. *SACB*, 382 U.S. 70 (1965) (Communist registration). Where the activity to be reported is not inherently suspect, however, the required disclosure does not rise to the level of compelled self-incrimination. See *Garner* v. *United States*, 424 U.S. 648, 660-663 (1976) (tax returns); *California* v. *Byers*, 402 U.S. 424 (1971) (California hit-and-run statute).[7]

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[6] Moreover, petitioner never objected at trial on *Garrity* grounds, and thus the government was precluded from placing in evidence other exhibits that would have shown that petitioner's statement could not have been the product of an official investigation. While petitioner did register a belated objection to the statement on the ground that he was not informed "of his Fifth Amendment rights against self-incrimination" (Tr. 383), he did not suggest that the statement was coerced because it was given in the course of a police investigation.

[7] Finally, the statement, an essentially exculpatory version of petitioner's role in the incident, was consistent with petitioner's testimony at trial (Tr. 305-340). Its introduction into evidence was therefore harmless beyond a reasonable doubt.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1980

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